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IN THE

Supreme Court of the United States.

No. 915.

OCTOBER TERM, 1957.

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

The Chamberlain Rule Is at the Core of the Decision Below. The Petition Should Therefore be Granted.

Because of the tremendous importance and effect of quickening the *Chamberlain*[1] rule, respondent is driven to argue:

1. The lower court did not mean to invoke the rule of *Chamberlain.*

2. *Chamberlain* does not mean what it says.

3. Even if *Chamberlain* were not the law, this case would have been decided as it was.

Intertwined with these basic arguments are *ad hominem* accusations of "clever advocacy";[2] going "beyond the

1. *Pennsylvania Railroad v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 958 (1932).

2. Respondent's Brief, pp. 7, 9.

limits of advocacy";[3] choosing "to ignore the present case";[4] having "considerable intestinal fortitude";[5] distorting the opinion;[6] and "a clever bit of sleight-of-hand."[7] There is no need to answer each of these completely unfounded characterizations, for they are all answered by showing that the opinion of the Court of Appeals did apply the *Chamberlain* rule and that *Chamberlain* was used by the Court of Appeals to obliterate the inferences in the petitioner's case and reach its conclusion.

We start with the proposition that petitioner's testimony showed that the ground where he was ordered to do his job was soft, rubbishy, sandy, smouldering loose fill (7a, 19a, 22a, 49a). Petitioner was required to jack a portion of a gondola car weighing twenty-six tons, on that type of ground. He was hit on the head with the jack handle while jacking the car. We do not and cannot imagine that Chief Judge Biggs, Judge Goodrich and Judge Hastie, in the light of the decisions in *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *McBride v. Toledo Terminal Railroad Company*, 354 U. S. 517, 77 S. Ct. 1398 (1957); and *Stinson v. Atlantic Coast Line R. Co.*, — U. S. —, 78 S. Ct. 136 (1957), would decide that upon such proof there was an "absence of evidence, either circumstantial or direct, tending to show that the negligence of the [respondent] had any influence or effect in causing petitioner's injuries"[8] unless the inference that the jack sank or tilted when the operation was done on such ground had for "some reason" disappeared.

The pivot of the opinion below was reached by the Court of Appeals when it spoke as follows:

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3. *Id.*, p. 7.
4. *Id.*, p. 5.
5. *Id.*, p. 7.
6. *Id.*, p. 7.
7. *Id.*, p. 12.
8. Petition, p. 23.

"And there was no such showing concerning the consistency of the ground that a sinking could properly be inferred *in the teeth of the uncontradicted affirmative evidence to the contrary.*"[9] (Emphasis supplied.)

If the court below had ended this sentence at the word "inferred", it would have been in factual error. But if *arguendo* that evaluation of the record were accurate, there then was a complete failure of proof of causation and the moment of adjudication had arrived. The court had finally to exercise its ultimate responsibility: extract the rule and apply it. On this hypothesis the controlling rule was clear and judgment for respondent would lie. *Atlantic Coast Line Railroad Company v. Collins,* 235 F. 2d 805 (C. A. 4, 1956), cert. denied 352 U. S. 942, 77 S. Ct. 265 (1956).

But the sentence did not end with the word "inferred," and the quotation unquestionably describes a record in a different posture than if no words followed "inferred". Recognizing this, the court below perceptively turned from the *Collins* rule to the only rule within whose four corners this record fits: *Chamberlain.* On this pivot the whole case was turned, and in its very next words the court below cited *Chamberlain* and then in a completely direct and open expression, explained exactly why it ruled as it did. This was its *ratio decidendi:*

"We conclude, *therefore,*[10] that there is no evidentiary basis for a rational inference that the alleged behavior of the jack handle was to any extent caused by the condition of the ground upon which it was being used."[11] (Emphasis supplied.)

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9. *Id.,* p. 20.

10. "3. For that reason, referring to something previously stated; because of that; on that ground; to that end; consequently; hence; as, they lost the wager; *therefore* they must pay." *Webster's New International Dictionary of the English Language* (Second Edition, Unabridged), p. 2621.

11. Petition, p. 20.

All of this, according to respondent, is the ". . . abstract proposition of law not suggested by the proofs . . ."[12]

Respondent asserts that the application of our reasoning process would prove ". . . that Mr. Justice Brennan was wrong" in *Herdman v. Pennsylvania Railroad,* 352 U. S. 518, 77 S. Ct. 455 (1957).[13] After diligently reading and repeatedly rereading respondent's argument in support of that assertion,[14] we regretfully conclude that it is incomprehensible. But whatever respondent's argument may mean, it is certainly plain that *Herdman* just has no place here. The two cases are simply not analogous. If they were, the lower court would have bottomed its decision on *Herdman,* which was decided the same day as *Rogers v. Missouri Pacific Railroad Co.,* 352 U. S. 500, 77 S. Ct. 443, (1957); *Webb v. Illinois Central Railroad Co.,* 352 U. S. 512, 77 S. Ct. 451 (1957); and *Ferguson v. Moore-McCormack Lines, Inc.,* 352 U. S. 521, 77 S. Ct. 457 (1957), instead of reaching back a quarter of a century to rely upon *Chamberlain.* By no process of logical reasoning can the rightness of our argument here prove *Herdman* wrong. The essential difference is simple and fundamental. There, petitioner agreed that the train stopped suddenly to avoid striking an automobile and so agreed that there was no negligence. Here, we do not concede that the jack did not sink, and hence did not agree that there was no causation.

Because it would have no legal or intellectual value, we forbear from commenting on respondent's conclusion that its own argument, now imputed to us, is "clever advocacy."[15]

Tacitly admitting that the evidence regarding the consistency of the ground was sufficient to support an inference of causation, respondent turns then to the petitioner's testi-

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12. Respondent's Brief, p. 1: "Questions Presented".
13. *Id.,* p. 8.
14. *Id.,* pp. 8-9.
15. *Id.,* p. 9.

mony and attempts to show that such testimony precludes that inference. Respondent accuses us in this instance of "a clever bit of sleight-of-hand" [16] when we say that such testimony referred to a time before the accident. We need only refer to the opinion of the court below to show that this testimony in no way precluded the inference that the jack tilted or sank at the time of the accident. The court said:

> "Neither he [the petitioner] nor his helper, whose back was turned, nor anyone else, saw or knows just what happened." [17]

Obviously, under those circumstances, neither petitioner nor anyone else could tell what happened to the jack at the time of the accident. Also, obviously, respondent has been unable to answer our quotation from *Rogers v. Missouri Pacific Railroad Co.*,[18] which holds that where there is uncertainty it is for the jury to resolve such uncertainty.

Finally, we earnestly believe that the opinion of the lower court shows beyond any doubt that the court meant to and did apply the rule in *Chamberlain* to defeat the petitioner's claim. Respondent nowhere argues for the merits of the *Chamberlain* rule as we interpret it and as the lower court interpreted it. It cannot.

CONCLUSION.

Respondent does not dispute that the question of the validity of the *Chamberlain* rule is eminently reviewable. Since we have shown indubitably that the *Chamberlain* rule was the heart of the decision below, the very fact that respondent now argues that it is not presented in this case is a tacit admission of its importance. The petition should be

16. *Id.*, p. 12.
17. Petition, p. 20.
18. *Id.*, pp. 8-9.

granted; *Chamberlain* should be overruled by name and the decision below should be reversed.

Respectfully submitted,

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